

EXECUTIVE OFFICE,

AUSTIN, March 16, 1874.¹⁷

To the Honorable Senate of the State of Texas:

I return herewith without my approval and respectfully ask a reconsideration by you of Senate bill No. 32, being "An act to amend 773b of the penal code."

The fifth subdivision of this act makes a failure to perform a promise upon which property is acquired, however honestly made at the time, if afterwards fraudulently broken, a felony to be punished by confinement in the penitentiary not less than two nor more than five years. It is an amendment to the act defining and punishing swindling, but is repugnant to it in a most essential particular in this, that under the act as it stands, the fraudulent intent must exist at the *time* the property is acquired, whereas the amendment in this bill will make a transaction, entirely honest at the time of acquisition, equally criminal if the promise is afterwards broken. Our statutes define theft, robbery and swindling—all three criminal modes of acquiring possession of property, differing but little, if at all, in moral turpitude—make the fraudulent criminal intent at the time of the acquisition absolutely essential to the guilt of the party. If he comes into possession of property lawfully or with honest intent, and afterwards determines to appropriate it fraudulently to his own use, the party is not guilty of theft. So of swindling, if a party gets possession of property on a promise or pledge which he honestly intends to perform at the time, this intention excludes the false or deceitful

¹⁷*Senate Journal*, 194, 195.

devise or fraudulent representation which must be present to constitute swindling. These statutes simply follow and are declaratory of the common law on these subjects and are believed to be identical with the statute laws of most, if not all of the States of the Union on the same subject. This bill proposes a fundamental departure from principles of criminal law, sanctioned by the wisdom and experience of ages, by rendering unnecessary that which has always been heretofore deemed an indispensable ingredient in the offense of swindling, and is irreconcilably at war with the first clause of the act which it amends where swindling is defined. In legal effect it makes a failure to comply with a promise to deliver property a felony, when the promiser received a valuable consideration at the time of making the promise, and this although the promiser may have at the time he made it been perfectly honest and have used no fraud or deception or device. The failure to deliver money is excepted in this bill. If that exception had not been made, I take it that a failure fraudulently to pay a promissory note when due would have subjected the maker to prosecution for swindling under this bill. The law cannot undertake to punish every immoral or dishonest act, and in defining acts which shall be punished as crimes I deem it best that we shall not depart from ancient and approved definitions or create new offenses, unless the necessity for it is manifest. I can well see how honest men who from misfortune are unable to comply with a promise or pledge may frequently be charged under this bill with a fraudulent breach, and how instead of a proceeding for punishing crime it might be resorted to by unworthy persons to force the collection of debt.

A creditor in a criminal prosecution could testify as to his understanding of a verbal contract and send the debtor, whose mouth is closed, he not being permitted to testify, to the penitentiary because the two differed in their construction or recollection of the contract. A knowledge of this advantage might prompt a creditor to urge, and a debtor to pay an unjust claim. The Penal Code already provides punishment for those who fraudulently dispose of mortgaged property.

It occurs to me that to go beyond this, which requires that the mortgage shall be in writing and recorded to the extent contemplated in this bill, would open the door wide to oppression and fraud and to a prostitution of the criminal jurisdiction of the courts to private and personal ends.

Very respectfully,

RICHARD COKE.